In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 115

WARREN TRADING POST COMPANY, APPELLANT

v.

THE ARIZONA STATE TAX COMMISSION, ET AL.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT

This case involves the right of the State of Arizona to require Indian traders operating trading posts located on the Navajo Indian Reservation to pay for the privilege of doing such business a two percent tax on the gross proceeds of sales made to Indians residing on the reservation. The questions presented are substantial and have not been previously ruled upon by the Court.

Appellant conducts a trading post on a Navajo Indian Reservation under a license granted by the Commissioner of Indian Affairs pursuant to 25 U.S.C. 261–262.[1] The State of Arizona has had, since 1935,

[1] The provisions of these and other pertinent federal statutes and regulations are set forth at pages D1–D22 of the Jurisdictional Statement.

737–694—64

a Transaction Privilege Tax (Arizona Rev. Stats. 42–1308, 1309, 1312),[2] which requires that all persons engaged in the business of making retail sales of tangible personal property in Arizona shall obtain a privilege license for a fee of one dollar and pay a privilege tax equal to two percent of such sales or the gross income from the business. Licenses are issued only if the applicant has paid the tax and are conditional upon continued compliance. Operation without a license is a misdemeanor punishable by fine and imprisonment (*id.* at 42–1308 B., E.).

Until 1957, this tax was never levied upon the sales of licensed Indian traders to Indians on the reservation (J.S. 7). In 1956, however, the Arizona State Tax Commission adopted Regulation 2.18.5[3] which provides that any person operating a trading post on an Indian reservation is "subject to the tax levied upon retail sales" and that such tax shall be paid "on gross proceeds of sales made to Indians residing on the reservation as well as off the reservation."

---

[2] These and other statutes of the State of Arizona are set forth in pertinent part at pages D22–D25 of the Jurisdictional Statement.

[3] The regulation is part of the Combined Privilege Sales and Use Tax Regulations and reads as follows: "*Trading Posts on Indian Reservations.* A person operating a commissary or trading post on an Indian reservation, under an agreement or license with the Indian agency, is subject to the tax levied upon retail sales. All proceeds of sales from whatever source derived are subject to the Transaction Tax upon the operator of the trading post making the sale. The vendor is subject to the Transaction Tax on gross proceeds of sales made to Indians residing on the reservation as well as off the reservation. Sales directly to the Federal Government are subject to 50% deduction."

When the tax was levied upon appellant's retail sales for the period November 1, 1956, through December 31, 1957, appellant brought this action seeking a declaratory judgment that the action of the Tax Commission was unconstitutional and in conflict with the express provisions of federal laws and regulations governing commerce with the Indian tribes (J.S. 8–9). The Superior Court for Maricopa County granted summary judgment for the Tax Commission (J.S. B1–B2) and was affirmed by the Supreme Court of Arizona (J.S. A1–A22). The latter court rejected appellant's contention that "the commerce clause of the federal constitution by its own force creates an area of trade free from interference by the state" and held that "state laws apply to the extent they do not conflict with federal Indian laws" (J.S. A6). The court reviewed the federal statutes on trading with the Indians and found no conflict or preemption of the field (J.S. A7).

The decision of the State Supreme Court upholding the tax levied by the State Commission presents the following questions:

> Whether Article I, Section 8, Clause 3 of the Federal Constitution, which provides that "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," denies to the State of Arizona the power to require persons operating a trading post on an Indian reservation to pay for the privilege of doing such business a tax on the gross proceeds of sales made to Indians on the reservation.

Whether the State's attempt to tax Indian traders selling to Indians on the reservation is invalid because Congress has occupied the field by adoption of a comprehensive system of statutes regulating such commerce.

1. The decision below is erroneous. The Supreme Court of Arizona ruled in this case that the "tax is on the privilege or right to engage in business" (J.S.A2). This Court has held that the States, by the Commerce Clause, "delegated to the United States the exclusive power to tax the privilege to engage in interstate commerce * * *." *Spector Motor Service* v. *O'Connor,* 340 U.S. 602, 608, and cases cited at 609; *Memphis Steam Laundry* v. *Stone,* 342 U.S 389. Accordingly, it is beyond question that the Constitution forbids a State from imposing a tax upon the privilege or right to engage in interstate commerce. Since the Commerce Clause grants Congress the same authority over commerce with the Indian tribes as over commerce among the several States, *Hanley* v. *Kansas City Southern Ry. Co.,* 187 U.S. 617, 619, it similarly prohibits a State from taxing the right to engage in commerce with those tribes.

But, even if the Commerce Clause were not an exclusive delegation of power in this area, Arizona's attempt to tax Indian traders selling to reservation Indians would be invalid because Congress has occupied this field and left no room for the action taken by the State. Beginning in 1876 in the Indian Trading and Intercourse Acts (19 Stat. 200) and continuing until today, Congress has exercised the power

granted over commerce with the Indian tribes to provide a comprehensive system of regulation of those persons who may trade with the Indians, of the goods that they may sell, of the prices to be charged and of a myriad of other details of such trade. Thus, 25 U.S.C. 261 presently provides:

> The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

As the Court stated in *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230, with respect to the effect of the United States Warehouse Act, "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Indeed, this is just such a case as that referred to in *Rice*, 331 U.S. at 230, and *Pennsylvania* v. *Nelson*, 350 U.S. 497, 504, where "the federal statutes 'touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject.'"

The Commissioner of Indian Affairs has explicitly recognized the exclusive nature of his authority over commerce with the tribes. Where he has wished to allow another person to collect fees from the traders, he has issued specific regulations to that effect. Thus, 25 C.F.R. 252.27c provides that "[t]he fees prescribed by these regulations shall not be con-

sidered as precluding the governing body of any Indian reservation or Pueblo from assessing and collecting such fees, etc., as it may deem appropriate." No such exception has been provided for the exaction of taxes by the States.[4]

The Arizona attempt to tax Indian traders also conflicts with the Congressional plan of regulation by the Commissioner of Indian Affairs. By making payment of the tax a condition of doing business in the State, the Arizona statute denies to the Commissioner the "sole authority to appoint traders" which 25 U.S.C. 261 gives him. The Commissioner exercised this exclusive authority by licensing appellant and the State cannot impose its own conditions upon the exercise of the Federally-conferred authority. It is no answer to say, as does the Arizona court (J.S. A8), that the Commissioner should limit his appointment to those persons who will comply or have complied with the State tax laws. *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187. The Commissioner's authority to determine proper persons for trading is not to be so confined by the States.

Recognition of the State's power to tax the privilege of selling to Indians on reservations would raise

[4] We reject as untenable the suggestion of the court below (J.S. A9) that the Buck Act of October 9, 1940, 54 Stat. 1059, 4 U.S.C. 12–18 (reprinted at J.S. D2–D4), provides such an exception. The Interior Department ruled to the contrary shortly after enactment of the Buck Act, 58 I.D. 562, as did the Supreme Court of the State of New Mexico. *Your Food Stores, Inc.* v. *Espanola*, 68 N.M. 527, 361 P. 2d 950. The Buck Act was aimed at confirming the taxing authority of the States over particular geographical areas which the States had ceded to the United States. Federal power over Indian reservations is unrelated to such cessions.

other conflicts with the federal laws. The power to levy a privilege tax on the gross proceeds of sales would give the State the power to affect the prices at which goods are sold to the Indians. As noted above, Section 261 gives the Commissioner of Indian Affairs sole authority over prices.

The Department of the Interior has twice ruled that a tax such as this may not constitutionally be applied to Indian traders selling to Indians on the reservation. In 1940 the Department ruled that the very Arizona tax at issue here could not be imposed upon Indians within a reservation and that persons trading with Indians on Indian reservations are not subject to the tax. 57 I.D. 124. In an opinion approved by Oscar Chapman, then Assistant Secretary, the First Assistant Solicitor stated (*id.* at 125):

> * * * The regulation of trade with Indian tribes is one of the powers expressly delegated to Congress by section 8 of Article I of the United States Constitution. Congress has exercised this power in statutes restricting trade with the Indians and giving exclusive authority to the Commissioner of Indian Affairs to regulate such trade and the prices at which goods shall be sold to the Indians. * * *
>
> * * * Where Congress has exercised its authority it is axiomatic that the field is closed to State action. *Sperry Oil and Gas Co.* v. *Chisholm*, 264 U.S. 488. Therefore, persons selling to or buying from Indians on Indian reservations are not subject to State laws which regulate or tax such transactions. * * *

This ruling was reaffirmed in 1943 by the Solicitor of the Department, 58 I.D. 562, who concluded that

Congress had not intended by enactment of the Buck Act, 4 U.S.C. 12–18, to interfere with the exclusive authority of the Commissioner of Indian Affairs over trade with the Indians on Indian reservations.

2. The decision below has significant impact. Until the action of the Arizona court at issue here, the position of the Department of the Interior expressed in its decisions of 1940 and 1943 has been universally respected by the States. As a consequence, the questions here involved concerning the scope of State authority over commerce with the Indian tribes have not previously been presented to this Court. If the decision below stands, other States are likely to follow Arizona's lead. There is thus the potential threat of general State taxation of traders on all Indian reservations. Appellant points out (J.S. 14) that 21 of the 25 States in which there are Indian reservations have retail sales taxes similar to the Arizona tax here involved. Since the traders, in turn, would find it necessary to pass on such taxes to their Indian customers either directly or indirectly through increased prices, the decision would have a material effect upon the economic status of the tribes which has long been a matter of great federal concern.

A substantial number of Navajos are affected by this decision. That tribe has a population of about 45,600 persons on the reservation in Arizona, with an average annual income of about $1,600. Almost all of their purchases are made at the trading posts operated by some 159 licensed traders. The prices at which these low income Indians make their purchases will

undoubtedly be affected if the State is permitted to impose this tax.

For the foregoing reasons, we submit that probable jurisdiction should be noted.

ARCHIBALD COX,
Solicitor General.
STEPHEN J. POLLAK,
Assistant to the Solicitor General.
ROGER P. MARQUIS,
Attorney.

JULY 1964.

U. S. GOVERNMENT PRINTING OFFICE: 1964